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10 UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 KATHLEEN A. ATCHISON, an individual
14 on behalf of herself and all others similarly
15 situated,

16 Plaintiff,
17 v.

18 PHILLIPS & COHEN ASSOCIATES LTD.,
19 and ADAM S. COHEN, an individual,

20 Defendants.

21 Case No.: C 05-02222 BZ

22 **CLASS ACTION**

23 **COMPLAINT FOR VIOLATION
24 OF THE FAIR DEBT COLLECTION
25 PRACTICES ACT**

26 **DEMAND FOR JURY TRIAL**

27
28 /

29 **INTRODUCTION**

30 1. Plaintiff brings this consumer class action under the authority of the Fair Debt
31 Collection Practices Act, 15 U.S.C. §§ 1692 -1692o (“FDCPA”). Plaintiff asks for a declaration
32 that Defendants’ debt collection practices violate the FDCPA, statutory damages for the class of
33 a sum not to exceed the lesser of \$500,000.00 or 1 per centum of Defendants’ net worth, plus
34 \$1,000.00 for the Plaintiff, attorneys fees and litigation expenses.

35 **JURISDICTION AND VENUE**

36 2. Jurisdiction in this Court is invoked by 15 U.S.C. § 1692k(d), and 28 U.S.C. § 1331.
37 Declaratory relief is available under the authority of 28 U.S.C. § 2201. Venue is proper in this
38 district because Plaintiff resides in this district, Defendants transact business in this district and
39 Defendants’ collection letter was received in this district.

PARTIES

3. Plaintiff KATHLEEN A. ATCHISON is an individual who resides in San Francisco, California and is sometimes referred to herein as "Ms. Atchison" or "Consumer."

4. Defendant PHILLIPS & COHEN ASSOCIATES LTD. is a business with its principal office at 695 Rancocas Road, Westampton, New Jersey. The company has debt collection call centers in Delaware and Florida. It employs 375 debt collectors and support personnel. The principal purpose of its business is the collection of debts owed or alleged to be owed to others. Its business practices are subject to the Fair Debt Collection Practices Act.

5. Defendant ADAM S. COHEN is an employee or principal in Defendant Phillips & Cohen and is a debt collector whose conduct is subject to the FDCPA.

6. Defendants PHILLIPS & COHEN ASSOCIATES LTD. and ADAM S. COHEN are hereafter referred to collectively as "Defendants," unless otherwise noted.

FACTUAL ALLEGATIONS

7. Shortly after November 17, 2004, Ms. Atchison received through the mail a form collection letter from Defendants demanding payment of an alleged debt to Fleet Credit Card. A true and correct copy of the form collection letter is attached as Exhibit A

8. The alphanumeric code assigned to the form collection letter is shown at the bottom of the letter as:

(QESP)40:T002:000585 :001:1000:04322:PUU01:PCAL001:01 PCAL001

9. The first paragraph of the collection letter tells Ms. Atchison:

Your account has been referred to our office for collection on behalf of the above-referenced creditor. To resolve this matter and prevent any further collection activity, full payment should be sent to this office at the address above.

10. The next paragraph, in bold type, instructs Ms. Atchison:

**IT IS NOT IN YOUR BEST INTEREST TO
NEGLECT THIS ACCOUNT! YOU MAY CONTACT OUR
OFFICE AT THE ABOVE TELEPHONE NUMBER.**

111

111

1 11. The letter is signed:

2 **Sincerely,**

3 **Adam S. Cohen**
4 **CEO/Co-Chairman**

5 12. Below Mr. Cohen's signature is a paragraph stating Ms. Atchison's right to
6 dispute the debt and request verification of the debt ("validation rights").

7 13. Defendant's demand for full payment of the debt to prevent further collection
8 activity contradicts Ms. Atchison's validation rights in the following manner.

9 a. Defendants must cease collection upon Ms. Atchison's requesting
10 verification of the debt, as provided by 15 U.S.C. § 1692g(b), as follows:

11 (b) **Disputed debts**

12 If the consumer notifies the debt collector in writing within
13 the thirty-day period described in subsection (a) of this section that
14 the debt, or any portion thereof, is disputed, or that the consumer
15 requests the name and address of the original creditor, the debt
collector shall cease collection of the debt, or any disputed portion
thereof, until the debt collector obtains verification of the debt or a
16 copy of a judgment, or the name and address of the original
creditor, and a copy of such verification or judgment, or name and
address of the original creditor, is mailed to the consumer by the
debt collector. [Emphasis added.]

17 b. Defendants must cease collection, except for specified acts, upon Ms.
18 Atchison's exercising her rights under 15 U.S.C. § 1692c(c), as follows:

19 (c) **Ceasing communication**

20 If a consumer notifies a debt collector in writing that the
21 consumer refuses to pay a debt or that the consumer wishes the
22 debt collector to cease further communication with the consumer,
the debt collector shall not communicate further with the consumer
with respect to such debt, except—

23 (1) to advise the consumer that the debt collector's further efforts
are being terminated;

24 (2) to notify the consumer that the debt collector or
creditor may invoke specified remedies which are ordinarily
invoked by such debt collector or creditor; or

25 (3) where applicable, to notify the consumer that the
debt collector or creditor intends to invoke a specified remedy.

26 If such notice from the consumer is made by mail, notification
27 shall be complete upon receipt.

28 14. The bold statement described in ¶ 10 above, soliciting a telephone call to the

1 Defendants, contradicts and overshadows the validation notice, which mandates that a request for
 2 verification be made in writing.

3 15. In collecting debts in the state of California, Defendants are required to make the
 4 following disclosure:

5 The state Rosenthal Fair Debt Collection Practices Act and the
 6 federal Fair Debt Collection Practices Act require that, except
 7 under unusual circumstances, collectors may not contact you
 8 before 8:00 a.m. or after 9:00 p.m. They may not harass you by
 9 using threats of violence or arrest, or by using obscene language.
 10 Collectors may not use false or misleading statements or call you at
 11 work if they know or have reason to know that you may not receive
 12 personal calls at work. For the most part, collectors may not tell
 13 another person, other than your attorney or spouse, about your debt.
 14 Collectors may contact another person to confirm your location or
 15 enforce a judgment. For more information about debt collection
 16 activities, you may contact the Federal Trade Commission at 1-
 17 877-FTC-HELP or www.ftc.gov. (Cal. Civ. Code §
 18 1812.700(a)(b).

19 Defendants fail to make the aforesaid disclosure as required by Cal. Civ. Code §
 20 1812.700(a)(b).

21 16. Upon the facts and law set forth herein, Defendants Phillips & Cohen Ltd.'s and
 22 Adam S. Cohen's practice of sending collection letters the same or similar to Exhibit A violates
 23 the FDCPA, and judgment should be entered as prayed.

24 **FIRST CLAIM FOR RELIEF**
(VIOLATION OF THE FAIR DEBT COLLECTION PRACTICES ACT)

25 17. Plaintiff incorporates by this reference all of the foregoing paragraphs.

26 18. Plaintiff is and was at all times relevant a consumer within the meaning of
 27 15 U.S.C. § 1692a(3). The transaction alleged between the original creditor and Plaintiff was a
 28 consumer transaction within the meaning of 15 U.S.C. § 1692a(5).

19 19. Defendants were at all times relevant "debt collectors" within the meaning of 15
 20 U.S.C. § 1692a(6).

21 20. The FDCPA is part of the Consumer Protection Act, and as such is liberally
 22 construed in favor of the consumer to effect its remedial purpose. Ross v. Commercial Fin.
Services, Inc., 31 F.Supp.2d 1077, 1079 (N.D. Ill. (1999); Cirkot v. Diversified Financial
Systems, Inc., 839 F.Supp. 941, 944 (D. Conn. 1993); Graydon v. National Systems, 1993 U.S.

1 Dist. LEXIS 20344 (N.D. Ga, October 14, 1983).

2 21. The Act is a strict liability statute and thus does not require a showing of
 3 intentional conduct on the part of the debt collector. Irwin v. Mascott, 94 F.Supp.2d 1052, 1057
 4 (N.D. Cal. 2000).

5 22. The Plaintiff need not prove the debt invalid or show any actual damage to receive
 6 statutory damages. Baker v. G C. Services, 677 F.2d 775, 780 (9th Cir. 1982).

7 23. The validation notice must not be overshadowed or contradicted by other
 8 messages appearing in the initial communications. Swanson v. Southern Oregon Credit, Inc.,
 9 869 F.2d 1222, 1225 (9th Cir. 1998).

10 24. In evaluating the tendency of language to deceive, the court looks to the least
 11 sophisticated consumer. Swanson, *id.*

12 25. Defendants violate 15 U.S.C. § 1692g(a) by sending a collection letter that fails to
 13 effectively disclose the consumer's validation rights, by including material that contradicts and
 14 overshadows the consumer's validation rights, thereby confusing the debtor.

15 26. Defendants violate 15 U.S.C. § 1692e and e(10) by sending a collection letter that
 16 is false, deceptive, and misleading by including material that contradicts and overshadows
 17 Plaintiff's validation rights.

18 27. Defendants' failure to provide the California notice regarding the restrictions on
 19 its conduct is a deceptive and misleading means used in connection with the collection of a debt
 20 in violation of 15 U.S.C. § 1692e(10).

21 28. Defendants' failure to provide the California notice regarding the restriction on its
 22 collection practices is an unfair and unconscionable means to collect a debt in violation of 15
 23 U.S.C. § 1692f.

24 **CLASS ALLEGATIONS**

25 29. This action is brought as a class action on behalf of (I) all persons with mailing
 26 addresses in the State of California (ii) to whom letters were sent by Defendants in the form
 27 represented by Exhibit A (iii) in an attempt to collect a debt arising out of a transaction in which
 28 the goods or services subject of the transaction were primarily used for personal, family, or

1 household purposes (iv) sent on or after a date one year prior to the filing of this action (v) which
2 letters were not returned undelivered by the United States Postal Service.

3 30. Plaintiff alleges on information and belief based on Defendants' use of form
4 letters that the class is so numerous that joinder of all members is impractical. On information
5 and belief there are more than forty (40) class members.

6 31. There are questions of law and fact common to the class, which common
7 questions predominate over any questions involving only individual class members. The
8 principal question is whether Defendants' collection letter, Exhibit A, violates the FDCPA as
9 alleged in Plaintiff's First Cause of Action.

10 32. Plaintiff's claims are typical of the class members. All are based on the same
11 facts and legal theories alleged herein.

12 33. Plaintiff will fairly and adequately represent the interests of the class members.
13 Plaintiff has retained counsel experienced in handling class actions involving unlawful practices
14 under the FDCPA. Neither Plaintiff nor Plaintiff's counsel has any interests which would cause
15 them not to vigorously pursue this action.

16 34. Certification of the class under Rule 23(b)(3) of the Federal Rules of Civil
17 Procedure is appropriate in that:

18 (1) The questions of law or fact common to the members of the class
19 predominate over any questions affecting only individual members.

20 (2) A class action is superior to other available methods for the fair
21 and efficient adjudication of the controversy.

22 35. Certification of a class under Rule 23(b)(2) of the Federal Rules of Civil
23 Procedure is also appropriate in that Defendants acted on grounds generally applicable to the
24 class, thereby making appropriate declaratory relief with respect to the class as a whole.

25 36. Plaintiff requests certification of a hybrid class combining the elements of Rule
26 23(b)(3) for monetary damages and Rule 23(b)(2) for equitable relief.

27 WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated,
28 requests of this Court the following monetary and equitable relief:

1 A. An Order certifying that the action be maintained as a class action under Rule 23
2 of the Federal Rules of Civil Procedure and appointing Plaintiff and Plaintiff's undersigned
3 counsel to represent the Class.

4 B. Pursuant to 15 U.S.C. § 1692k(a)(2)(B), statutory damages of (a) \$1,000.00 for
5 the named Plaintiff and (b) a sum not to exceed the lesser of \$500,000.00 or 1 per centum of the
6 net worth of Defendants for all other class members.

7 C. Reasonable attorney's fees and costs pursuant to 15 U.S.C. § 1692k(a)(2)(B)(3).

8 D. Such other and equitable relief as this Court may deem necessary or proper.

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10 Dated: June 1, 2005

/s/ Irving L. Berg
Irving L. Berg

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17 ATTORNEY FOR PLAINTIFF

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19 **JURY DEMAND**

20 Plaintiff demands trial by jury.

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22 Dated: June 1, 2005

/s/ Irving L. Berg
Irving L. Berg